No. 98-303

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

DONALD A. BARNETT, SHEILA GOLD, RONDA CHANEY, LON CHANEY, JR., WILLIAM P. MITCHELL and ROBERT Q. BUICKEROOD,

Petitioners-Intervenors Below,

vs.

GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, and ROBERT BATINOVICH, et al.,

Respondents-Defendants,

and

ANTHONY BLUMBERG,

Respondent-Original Plaintiff Class Representative.

On Petition For *Writ Of Certiorari*
To The California Court Of Appeals
For The First Appellate District, Division Four

RESPONDENT ANTHONY BLUMBERG'S OPPOSITION TO BARNETT PETITION FOR CERTIORARI

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QUESTION PRESENTED

In litigation over the consolidation "rollup" of a series of limited partnerships into a single corporate entity which has been certified as a mandatory (i.e., non-opt-out) class under State law concepts mirroring federal rule 23(b)(1)(A), because separate inconsistent adjudications (e.g., of the legality of the transaction and the allocation of the single class of resulting shares) would establish incompatible standards of conduct for the parties opposing the class, and where the transaction, as improved by the class settlement, has been submitted to vote by all class members and received the affirmative approval by a majority of units of each partnership in accordance with the governing partnership agreements, whether due process requires that absent class members nonetheless must still be granted an opt-out opportunity because the original complaint contained a request for money damages as an alternative remedy, even though they are not primary to the case, and flow solely from the equitable allocation of units/shares at the heart of the controversy.

PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceeding.

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I.

STATEMENT OF THE CASE

Petitioners ask the court to review the California State courts' approval of a settlement of class litigation originally brought by limited partner/class representative Anthony Blumberg challenging the terms of a proposed "roll-up" consolidation of eight illiquid California limited partnerships into a single Real Estate Investment Trust (commonly known as a "REIT") whose shares thereby became listed and readily tradable on the New York Stock Exchange (symbol "GLB").

The California Superior court certified the settlement class (October 11, 1995) on a mandatory (i.e., non-optout) basis, under State provisions mirroring FRCP 23(b)(1)(A). Pursuant to each partnership's governing agreement, the transaction, as improved by terms negotiated by class counsel, was submitted (October 26, 1995) to the vote of all unitholders and received the requisite approval by a majority of the units of each partnership as required by the Partnership Agreements. App. 6. Petitioners, certain limited partner objectors below, intervened in the trial court and actively asserted their objections to the settlement, which the court received on hearing and briefs, considered, and rejected, ultimately approving the settlement in toto. App. 49.[1]

In a lengthy, but unpublished decision, the California Court of Appeal affirmed. *Barnett v. Glenborough Realty*

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[1] All "App." citations are to the Appendix to the Barnett petition for Certiorari.

Corp. (Cal. App. 1st Dist., Div. 4, February 17, 1998) App. 1.

As detailed herein, the issue requested by petitioners (i.e., whether due process permits certification of a mandatory/nonoptout class in a primarily money damages case) is not presented in this case at all. Rather, the case has always been entirely about the legality and fair allocation of units in a corporate structuring transaction, purely equitable issues that have traditionally been, and can only be, resolved on a unitary nonoptout basis, to avoid conflicting results in different forums, and fully satisfy all due process concerns that dissenting partners' interests be vigorously asserted and considered.

1. Petitioners' Mischaracterization Of The Case.

In order to attract the Court's attention, Petitioners mischaracterize the case and omit critical facts in a number of critical respects:

(1) mischaracterize the nature of the case as a money damages, rather than primarily equitable, case concerning the allocation of interests among the parties to the transaction;

(2) omit mentioning that the transaction, as improved by the settlement, obtained the requisite affirmative approval by a majority of the units in each partnership;

(3) ignore that the transaction as finalized and voted on reflected substantial improvements that have been reflected in the post-transaction market;

(4) ignore the fact that petitioners' due process rights were fully met by affording their active participation in the court below, which considered but rejected their objections to the settlement.

(5) Omit mention that petitioners never requested an optout right for themselves in the trial court.

(i) Nature Of The Case Is Primarily The Equitable Allocation Of A Single Class Of The Ownership Units Of A Single Entity; Not Primarily Money Damages. Petitioners first misportray the case as a primarily money damage class action that was inappropriately treated as equitable, settled by a non-cash settlement that was obtained by offering big fees.[2] While such cases may exist elsewhere, the courts below all recognized that this case was always primarily an equitable action, to determine the legitimacy of a "rollup" consolidation transaction, the allocation of shares of the resulting entity and the post-transaction protections to the value of those shares.

As such, the case was always a "(b)(1)" type class, for which opt outs are not appropriate. Since the case was wholly and always a dispute over the legality (declaratory relief) and the fair allocation of interests in a corporate structuring transaction, the only "money damages"

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[2] In fact, the appellate court confirmed that "the record shows that there was no discussion of fees or incentives until after the parties reached agreement on the substance of the settlement." App. 17.

involved were secondary the incidental result of equitable or declaratory relief; i.e., the value of whatever excessive allocation of shares were ultimately received by the general partner defendants in the transaction. App. 21.

There is absolutely no basis, in or outside the record, for the petitioners' assertion that the case was *primarily* a money damage case, Petition at 22, nor the Petitioners' unsupported and unspecified assertions that the settlement foreclosed the class from "money damages" that petitioners label as "substantial" or how they had an "estimated value of between $10 and $20 million", without disclosing the nature of those damages. Petition at 8.[3]

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[3] The petitioners never identify what they believe the nature of these substantial money damages are, and with good reason. Referring to the damages specified in our original complaint, the compensation was for the value of the units that would be excessively allocated to the general partner in the transaction. Thus the money damages were actually secondary, potential future damages sought to be avoided by an equitable allocation of shares in the resulting entity.

As distinct from "purchase" cases, asserting seeking recovery of overpayment or defrauded costs for buying units, this case never had such a component. The partnerships had been formed years before, promoted and sold by other companies. The defendant general partner here had acquired its management/general partner interest years later, by purchase or out of bankruptcies. App. 2. Thus, no securities fraud-type purchaser "money damage" claims were ever assertable against these defendants. Also, there was no assertion by either plaintiffs or objectors that the defendants had committed improprieties in their operation of the partnerships. Thus, the only "money damages" claim in the case at all, was the incidental value of excessive units that might have otherwise been allocated to the general partner in the transaction. See: Manual for Complex Litigation 3d, § 30.13 at 217 n.681.

The Primary Issue Is Equitable: The Apportionment Of Equity Interests Among The Partners. In all such reorganizations the primary issue issue is equitable – how the resulting entity REIT's shares are to be apportioned between the General Partner, on the one hand, and the aggregate Limited Partner interests, on the other.[4]

As readily understood by the courts below, it is the Level I allocation which is the primary battleground, because it is there that the interests of the general partner and the limited partners in the proposed transaction conflict, over how the equity "pie" is divided.

(ii) The Settlement Was Voted On And Affirmatively Approved By A Majority Of The Units In Each Partnership, In Accordance With The Governing Partnership Agreements. The Petitioners also fail to acknowledge that each partnership's agreement dictated the

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[4] Allocations actually occur on three levels: First, the "Level-One" allocation of units between the management company and the limited partnerships in the aggregate; second, the "Level-Two" allocation of the aggregate partnerships' units among the eight limited partnerships; third, the "Level-Three" allocation of each limited partnership's units among its partners. As originally proposed by the management company/general partner, the Level I allocation was to be made on the basis of the relative cash-flow contributed by the limited partnerships' real estate of their properties and the management companies' cash flow from its management contracts. The Level II allocation among the limited partnerships was made based upon the relative appraised valuation of each partnerships' underlying assets. The Level III allocation, within each partnership, was done on the basis of how a liquidation of units would be distributed among the partners under the governing partnership agreements.

manner in which such reorganizations are accomplished, omits mention that the transaction (whose terms were improved and better disclosed as a result of the class settlement) was actually submitted to a vote of all class members/limited partners, or that they affirmatively approved the merger, by the requisite majority vote of each partnership's units, in full compliance with each Partnership's government Agreement. App. 6. This starkly contrasts with the usual settlement, in which class members' views are generally only inferable from their inaction.

(iii) The Substantial Benefits From The Settlement. The petition also omits mention of the substantial benefits produced by the litigation and settlement. As the courts below recognized, the numerous improvements that were made to the transaction as it progressed to its final form – the improved proxy disclosures, the freezing of the units' allocations between the General and the "limiteds" in spite of the general partners' contribution of substantial additional assets to the transaction, (increasing management's contributed cashflow by some 50% plus the improved and extended antidilution and post-rollup market price protections – all resulted from class counsel's efforts. The appellate court explicitly recognized this factor, App. 14-15, and rejected the Petitioners' misrepresentation, repeated in their petition at 19, that the settlement added nothing to the final transaction presented to the class. The petition intentionally ignores the fact that class counsel had succeeded in having all the equitable improvements incorporated into the proposed transaction as it developed, and that the final "deal" that emerged reflected Class counsel's efforts achieved prior

to the formal settlement agreement that recognized these benefits. App. 14-15.

As recognized by the courts below, these benefits were substantial: (i) improving the disclosures in the *prospectus*, (ii) adding and extending the post-rollup market price protections, and (iii) preventing any increase in management's share of the Level I allocation of units even after it was demonstrated that management would otherwise have been entitled to more, reflecting the the general partners' contribution of substantial *additional* cash-flow from an additional management contract (the "Rancon Management contract") without increasing the management company's share of the resulting entity to reflect the increased cashflow. App. 15.

Moreover, on a purely cash basis, the transaction's benefits to these limited partners, from where they were when the transaction was proposed, is undeniable and superior to the liquidation and sale that the Petitioners/objectors had demanded below.[5] Thus, the benefits of the

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[5] Like most limited partnerships sold during the 1970's and 80's, none of the partnerships had performed as hoped. Only two of them had ever actually returned their limited partners' entire original investment over the whole period of the partnerships' lives. App. 2. Since the units of such partnerships traded only in a highly liquid unregulated secondary market, partners who wished to "cash out" could generally find buyers for their units only at approximately 50% of the units' underlying asset value.

Viewed in relationship to the apportioned REIT units, each partner's interest in his $15.00 per-unit underlying value was thus salable prior to the transaction for only approximately $7.50.

transaction have been substantial to the limited partners class members, who previously could liquidate their units at only 50% of underlying value, App. 2, but now hold shares easily liquidated at nearly 200% of underlying values, or just sit, comfortably holding the units and continuing to receive quarterly distributions which have themselves increased since the rollup.

Thus, the settlement was fair and reasonable, and produced a transaction that was approved not only by the Court, but also by the class members' affirmative vote, after a disclosure which was itself improved by the settling plaintiffs' efforts. And, it has resulted in cash benefits vastly greater than the liquidation that petitioners sought below. Accordingly, the transaction was not only fair, reasonable and approvable. It was also demonstrably superior to the liquidation which the objectors urged below.

The results produced by the conversion have been superior. After the transaction, although the REIT units (NYSE trading symbol: GLB) temporarily dipped to as low as $12.50 per unit for a short time (reflecting normal pent-up sale desires by longtime holders, the units quickly rebounded to their $15.00 Exchange Value, and thereafter rose steadily, such that GLB shares have recently been actively trading (and readily saiable) at $30.00 per share, only recently dropping to the mid-twenties in the recent market corrections. In contrast, the petitioners, as objectors below, favored the forced sale of the real estate and liquidation of the partnerships in individual real estate sales which would have resulted in discounts of 5-30% from appraised values (A.A. 1494) and/or reduced by ongoing operational costs of operating the partnerships during the sale process period (A.A. 2349) netting no more than $15.00 per unit and spread over the number of years during which sales efforts would be conducted.

(iv) The Courts Below Afforded The Petitioners Full Due Process Rights Which They Aggressively Asserted. As is apparent from the trial and appellate court decisions below App. 49, and App. 1, these petitioners intervened in the case, and fully litigated the issues relating to fairness and the criteria for approval. No assertion was ever made that California was an inconvenient nor inappropriate forum to resolve these issues. Thus petitioners' due process rights were fully and actively afforded and asserted.

(v) These Petitioners Never Requested To Be Excluded At The Trial Court. Petitioners' Statement of the Case at 11, artfully glosses over the fact that these petitioners never sought exclusion in the trial court. Rather, they challenged solely the fairness of the settlement. The other objectors who sought exclusion never appealed. Accordingly, petitioners' standing to assert this claim is questionable at best.

II.

REASONS FOR DENYING THE WRIT

A. Mandatory Class Certification Treatment was correctly accepted as the only appropriate method of adjudication of the equitable allocation of units in a single entity.

The Mandatory Non-Opt-Out Class In Context. Totally ignored by the Petitioners, the allocation of shares of a corporate entity can be determined in *only* one way for all partners. The units in a single corporate entity cannot be resolved differently for different

people. This is precisely what Federal[6] Rule 23(b)(1)[7] and (b)(2)[8] certifications were made for and why it is not remarkable that they are, and have always been acknowledged as appropriately non-opt-out cases.

Differently oriented, Rule 23(b)(3) money damage *recovery* cases (previously referred to as "spurious" class actions)[9] are, in substance, entirely separate claims that are permitted to be aggregated, certified as class actions for the management benefits and the economies of scale realized by grouping a bunch of money-recovery cases

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[6] The Federal Rules and case law interpretations are a persuasive source of authority that California Courts may rely upon. *See Vasquez v. Superior Court*, 4 Cal. 3d 800, 821 (1971); *La Sala v. American Savings & Loan Association*, 5 Cal. 3d 864 (1976).

[7] Federal Rule 23(b)(1) pertains where:

> "the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest . . . ".

[8] Rule 23(b)(2) applies where "the party opposing a class has acted or refused to act as grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declarative relief with respect to the class as a whole . . . ".

[9] For a discussion of the pre-1966 three-category distinction between "true", "hybrid" and "spurious" class suits, see Yeazell, From Medieval Group Litigation to the Modern Class Action (Yale Univ. Press, New Haven, 1987) at 230-2.

together, that often might not otherwise be viable, individually. The recovery for one plaintiff does not conceptually conflict with a differently calculated recovery for another, even if they are against the same defendant. So, (b)(3) cases must generally retain the opt-out privilege for a plaintiff who nonetheless wishes to press his/her own claim, on his or her own. See *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 (1985).

In contrast, cases are certified under Rule 23(b)(1) for resolution of claims that must be ultimately resolved in one way for all class members. These are "true" or "hybrid" class actions, akin to joinder and interpleader actions in which an opt-out right would create a veto power in any party to thwart the rule's purpose of ascertaining or adjudicating all of the interests in a finite res. The allocation herein of a single class of shares of the post-transaction REIT cannot be issued in conflicting quantities. So, as long as all class members' due process rights to be heard are protected, as they certainly were herein, no further right of opt-out or exclusion is appropriate or required.

B. The Petitioners' Claimed Conflict On This Issue Does Not Exist.

Petitioners' claim that a conflict exists on this issue is demonstrably false, based on a disingenuous mischaracterization of four cases. The first two, *Brown v Ticor*, 982 F.2d 386 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1992), then *dismissed*, 511 U.S. 117 (1994); and *Bell v. American Title Insurance Company*, 226 Cal.App.3d 1589 (1991) (*Bell*), were consumer actions initiated primarily for money

damages to recover past, already-suffered, overcharges for title insurance, that were settled by mandatory classes, due to their settlements having substantial prospective equitable relief governing on the defendants' future sales activities. *Ticor* overruled the application of mandatory treatment; while *Bell* found it was within the trial court's discretion to find the case primarily equitable. *Adams v. Robertson*, 518 U.S. 810 (1996), deals with different insurance sales, but otherwise just another case of an action brought over past-suffered overcharges, a (b)(3) type of case, that was settled by a mandatory class by reason of the inclusion of equitable prospective relief.

But, regardless of whether it was appropriate to settle those past-damages money purchase cases by a mandatory class by including prospective equitable relief in the claim or settlement, there is no such conflict in a case like this one, that was always brought and settled as an inherently mandatory and equitable challenge to a transaction that had not yet occurred, and from which the only money damages were the potentially excessive incidental value of the units to be allocated by equitable or declaratory relief.

Accordingly, petitioners' last-cited case, *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994), is the only relevant one they cite, and it presents no conflict. There, the Third Circuit approved of a Delaware court's adjudication of corporate restructuring issues affecting all absent class member shareholders of a Delaware corporation. The concept is not remarkable. In *Hynson v. Drummond Coal Co.*, 601 A.2d 570 (Del. Ch. 1991), the Delaware Court of Chancery concluded that it could exercise jurisdiction over absent

members of a plaintiff class who had not been provided an opportunity to opt-out of an action for breach of fiduciary duties, based solely on the fact that they owned stock in a Delaware Corporation. 601 A.2d at 575-79.

Similarly, the California courts had sufficient minimum contacts to the nominal defendant California limited partnerships to support that state's courts deciding these issues for all partners.[10] Each class member voluntarily acquired an interest in a California limited partnership, with the reasonable expectation that their rights relating to their partnership interest might be resolved in a legal proceeding in that State.

Akin to interpleader, in which the ownership units of a single *res* or entity can be allocated in only one way,[11] it was absolutely necessary *to* certify the class herein as a non-opt-out one within the categories described by Federal Rules of Civil Procedure, Rule 23(b)(1) and (b)(2), and not just for settlement purposes, either, because the dispute over how the REIT's single class of shares would be issued could be resolved only one way by a declaration of the allocation of the REIT's single class of shares among all unit holders.

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[10] See *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). While the newly incorporated REIT was to be a Maryland entity, the State courts of California have overwhelmingly primary contacts to determine the right of partners in California-organized limited partnerships.

[11] *See United States Trust Co. of N.Y. v. Ulpert*, 163 FRD 409, 421 (SDNY 1995), rejecting assertion of opt-out rights in litigation over allocation of unit trust proceeds.

Thus, this case is *precisely* the context in which (b)(1) classes [which must be resolved in one fashion] and (b)(2) classes [injunctive relief against wrongs that have not yet occurred] are appropriate, as distinct from (b)(3) classes, in which each member has a separate action for money damages that a common defendant has caused.[12]

While injunctive actions certified under analogs to federal rule 23(b)(2) *permit* the creation of a non-opt-out class, Rule 23(b)(1) probably *requires* it, because this rule's whole *purpose*[13] is to provide a single vehicle for dealing

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[12] In contrast, Rule 23(b)(3) permits the use of the class vehicle where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members". Thus, where the question is just money damages from a single defendant, Rule 23(b)(3) provides a vehicle to save the courts and the parties the cost of multiple litigations and requires the courts to afford the exercise of opt-outs because there is no reason to preclude each party who actually chooses to separately pursue his money damages claim from doing so.

[13] The differences between the sections arise out of the federal rules Committee's efforts to clarify the previous difficulty in handling what had been previously referred to as "true" class actions which (like this one) adjudicate joint interests in a common entity that cannot be simultaneously allocated in two different ways (like here) versus "hybrid" class actions (in which the interests are several, but which should all be treated the same) and the difficultly named "spurious" class actions which, as merely the permissive joinder/aggregation of entirely several claims, to render them economically feasible to pursue, cannot justify precluding an independent minded plaintiff to pursue his own claim, on his own. *See, e.g., Harkins*, Federal Rule 23 – The Early Years, 39 Arizona L. Rev. 705, 707 (1997).

with situations like this, where the allocation *must be made* in *one way* for *all class members.*

C. Petitioners Do Not Dispute That The Court's Analysis Of The Settlement Was Full And Rigorous In Satisfying Petitioners' Due Process Rights.

Petitioners do not dispute that all necessary evaluative criteria were studiously applied by the trial court and the appellate court below, including the detailed consideration of all of petitioners' objections presented to the court.

Both the trial court (App. 51) and the Appellate Court below (App. 7-17), at *Barnett,* Slip Op. 5-13, extensively analyzed the settlement, reviewed the approval process in detail, concluded that the certification under Rule 23(b)(1) and (b)(2) were appropriate, determined that the settlement appeared substantively fair, then proceeded to evaluate the procedural due process and concluded that the settlement was substantively fair, appropriately negotiated and should be approved. The court's opinions clearly show that the petitioners were given every opportunity to assert their objections, and that they aggressively did so. Due process requires no more than that.

III.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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